STATEMENT OF
COMMISSIONER MICHAEL E. TONER
PUBLIC HEARING ON PROHIBITED AND EXCESSIVE CONTRIBUTIONS; NON-FEDERAL FUNDS OR SOFT MONEY
JUNE 4, 2002

I want to thank everyone who provided comments under a very tight timeframe regarding this critical rulemaking. All of the comments were informative and will aid the Commission in deciding upon the final rules that we publish in a couple of weeks.

At the outset, I want to stress that this is an extraordinary moment in the history of this agency. Congress has passed the most sweeping changes to the federal election laws in a generation and has instructed the Commission to expedite its work to ensure that all of the rulemakings associated with the Bipartisan Campaign Reform Act ("BICRA") are completed by the end of the year. Congress was wise to establish this strict deadline, because it recognizes that people need to know – and need to know now -- what BCRA does and does not allow them to do, and what they have to do to comply with the law. For this to occur, the Commission must establish clear and concise guidelines that are understandable to people involved in politics at the grassroots level across the country. As I have noted before, if we fail to issue clear guidelines, we will have failed to perform our core duties as a Commission, and we will have betrayed our responsibility to implement BICRA in a way that is meaningful and comprehensible to ordinary people who are active in American politics at the national, state, and local level.

Despite this critical imperative, there are some among us who argue that there is no need to issue bright-line rules and regulations, that we should maintain broad prosecutorial discretion, that legal standards are best developed after-the-fact through

years of enforcement cases and litigation. I categorically reject this approach. Such an approach would deprive people now of a clear sense of what they can and cannot do under BCRA. Such an approach would leave affected parties in the future at the mercy of the Commission's prosecutorial discretion and, for the unfortunate ones who became test cases, could force them to endure years of invasive discovery and spend hundreds of thousands of dollars in legal fees. Most importantly, such an approach would amass a frightening amount of power within this agency to decide who among the body politic has and has not complied with the law. Such an approach is antithetical to our society's historic commitment to civil liberties, due process, and prior notice of what is prohibited, particularly where, as here, significant criminal and civil penalties can be imposed.

That is one reason why I am so heartened by many of the comments the Commission has received supporting an effort to implement BCRA with clear rules and understandable standards. For example, the NAACP National Voter Fund urges the Commission to adopt bright-line tests in several key statutory areas, and to avoid issuing rules that "unduly hinder the ability of bona fide non-profit organizations to effectively achieve their non-partisan missions." Furthermore, Nan Aron, on behalf of the Alliance for Justice, stresses that "if the FEC fails to clarify areas of uncertainty in the regulations now, it will create confusion and over-cautious behavior that will have long-term ramifications for candidates and nonprofit organizations." To avoid this outcome, the Alliance for Justice calls on the Commission to create several safe-harbor provisions to provide much-needed clarity to the law. In addition, the AFL-CIO, in submitting comments on behalf of "over 13 million working men and women throughout the nation," strongly urges the Commission to limit the concept of agency in BCRA to individuals

"who have 'actual express oral or written authority to act on behalf of' an individual or entity . . ." The AFL-CIO believes such an interpretation is necessary to "preserve civic participation in political parties and candidate campaigns," and to avoid trampling on the ability of people to volunteer.

In light of these and other comments, a strong bipartisan consensus has emerged across the ideological and political spectrum, among civil rights organizations, non-profit groups, and labor organizations, that it is essential the Commission issue bright-line rules implementing BCRA.

Despite this broad-based support, it will be a major struggle to finalize clear and easily understandable rules. Powerful lobbyists and interest groups, mainly from Washington, DC, will argue that any effort to provide guidance and prior notice will create potential loopholes, as if telling people what the law is is antithetical to the law itself. To hear these people talk, it is as if they propose to lower the speed limit from 65 mph to 55, but then to refuse to tell anyone what it is, and leave it to our prosecutorial discretion to decide later whether someone is driving "too fast." Given this absurdity, one can only conclude that these critics want to keep for themselves and their allies here at the Commission the awesome power to decide later what is legal and illegal under BCRA, and in the meantime leave people involved in politics uncertain, under the threat of government investigation, about what they can and cannot do under the law. Such a coercive regime has no place in America, especially when the free exercise of fundamental First Amendment rights is at stake.

Therefore, this agency has no higher duty right now than to issue clear and understandable rules implementing BCRA, so that average Americans, who thankfully

are not lawyers and lobbyists, can know what their obligations are under the new law. Many of these people volunteer at the state and local level on their own time, during nights, weekends, and whenever else they can, for the candidates, parties and causes of their choice. They are the heart of grassroots American democracy. Providing them with clear rules is not a loophole, it is a civic duty. We will have failed as a Commission if we do no less. Thank you, Mr. Chairman.